No. 07-1055

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ANTOINETTE PIRANT,

Plaintiff-Appellant,

v.

UNITED STATES POSTAL SERVICE,

Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of Illinois, Joan H. Lefkow, Judge

# BRIEF FOR THE SECRETARY OF LABOR AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE'S PETITION FOR PANEL REHEARING

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# BRIEF FOR THE SECRETARY OF LABOR AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE'S PETITION FOR PANEL REHEARING

Pursuant to Federal Rule of Appellate Procedure 29, the Secretary of Labor ("Secretary") submits this brief as amicus curiae in support of Defendant-Appellee's petition for panel rehearing. The petition is limited to the issue whether this court applied the correct legal standard in determining that the time Plaintiff allegedly spent each day putting on and taking off her uniform shirt, gloves, and work shoes does not count as "hours worked" under the Fair Labor Standards Act of 1938, as amended ("FLSA" or "Act"), 29 U.S.C. 201 et seq., and therefore cannot be used to satisfy the Family and Medical Leave Act's ("FMLA") 1,250 hours of service requirement for eligibility, see 29 U.S.C. 2611(2)(A). While the Secretary does not

disagree with this Court's decision to affirm summary judgment for the Postal Service in light of Plaintiff's failure to allege any facts sufficient to defeat summary judgment on this issue, the Secretary believes that the Court should not have relied on the Second Circuit's decision in Gorman v. Consolidated Edison Corp., 488 F.3d 586 (2007), cert. denied, 128 S. Ct. 2902 (2008), in concluding that the time Plaintiff spent donning and doffing is not compensable under the FLSA. See Pirant v. United States Postal Serv., 542 F.3d 202, 208 (7th Cir. 2008). The Second Circuit's decision in Gorman is at odds with Supreme Court and other precedent and with the Department of Labor's ("Department" or "DOL") longstanding interpretation of the FLSA and the Portal-to-Portal Act ("Portal Act"), 29 U.S.C. 251 et seq., and has been criticized by other courts. Thus, the Secretary supports Defendant-Appellee's petition for panel rehearing seeking to amend the decision in this case to eliminate any reliance on Gorman, as well as to characterize correctly the Supreme Court's holding in IBP, Inc. v. Alvarez, 546 U.S. 21 (2005).

## INTEREST OF THE SECRETARY OF LABOR

The Secretary has a substantial interest in the issue presented by this petition for panel hearing because she administers and enforces the FLSA. See 29 U.S.C. 204, 216, 217. Consistent with that responsibility, DOL has issued interpretive regulations addressing the compensability of "hours worked" under the FLSA, see 29 C.F.R. Pt. 785, and the Portal Act. See 29 C.F.R. Pt. 790. The Department also has issued formal guidance on the compensability of donning and doffing activities under the FLSA after the Supreme Court's decision in IBP, Inc. v.

Alvarez, 546 U.S. 21 (2005) (in which the United States participated as amicus curiae). See Wage and Hour Advisory Memorandum No. 2006-2 (May 31, 2006).[1]

The Secretary currently is prosecuting major legal actions seeking compensation under the FLSA for donning and doffing sanitary and protective gear. See, e.g., Chao v. Pilgrim's Pride, No. 07-01352 (N.D. Tex. filed Aug. 6, 2007), transferred to W.D. Ark., No. 08-01011 (Feb. 15, 2008); Chao v. Tyson Foods, Inc., No. 02-1174 (N.D. Ala. filed May 9, 2002). In addition, the Secretary has participated as amicus curiae in a number of federal appeals addressing the compensability of donning and doffing such gear. See, e.g., DeAsencio v. Tyson Foods, Inc., 500 F.3d 361 (3d Cir. 2007), cert. denied, 128 S. Ct. 2902 (2008); Tum v. Barber Foods, Inc., 360 F.3d 274 (1st Cir. 2004), aff'd in part, rev'd in part, and remanded, 546 U.S. 21 (2005); Alvarez v. IBP, Inc., 339 F.3d 894 (9th Cir. 2003), aff'd 546 U.S. 21 (2005). The Department believes that its expertise on this issue would be helpful to this Court in considering whether to grant the petition for panel rehearing and amend its decision.

## ARGUMENT

### THIS COURT DID NOT NEED TO RELY ON THE SECOND CIRCUIT'S ERRONEOUS DECISION IN GORMAN TO CONCLUDE THAT PLAINTIFF'S DONNING AND DOFFING ACTIVITIES WERE NOT COMPENSABLE UNDER THE FLSA

1. The FLSA provides the legal standards for determining whether an employee has satisfied the FMLA's 1,250 hours of service requirement. See 29 U.S.C. 2611(2)(C). Under the FLSA, an employer generally must compensate its

[1] Available at: http://www.dol.gov/esa/whd/FieldBulletins/AdvisoryMemo2006_2.pdf.

employees at either minimum wage or overtime rates for all "hours worked." See 29 U.S.C. 206, 207. The Portal Act, however, creates a limited exception to this general rule, relieving an employer of responsibility for compensating employees for travel and other "preliminary" or "postliminary" activities that occur either before an employee starts his or her first principal activity of the workday, or after an employee ends his or her last principal activity of the workday. See 29 U.S.C. 254(a). All time in between an employee's first and last principal activity (with the exception of bona fide breaks) is part of the "continuous workday" and must be compensated. See IBP, Inc. v. Alvarez, 546 U.S. 21, 28-29 (2005).

The Supreme Court has held that "activities performed either before or after the regular work shift, on or off the production line, are compensable under the portal-to-portal provisions of the Fair Labor Standards Act if those activities are an integral and indispensable part of the principal activities for which covered workmen are employed." Steiner v. Mitchell, 350 U.S. 247, 256 (1956). The Court recently clarified that "any activity that is 'integral and indispensable' to a 'principal activity' is itself a 'principal activity' under § 4(a) of the Portal-to-Portal Act." Alvarez, 546 U.S. at 37. Such an activity is compensable under the FLSA and begins the "continuous workday." Id.

In Steiner, the Supreme Court held that changing into old clean work clothes and showering on the employer's premises by battery plant workers were integral and indispensable to the employees' principal activities. See 350 U.S. at 249, 254-58. The Court based its holding in part on DOL's regulations interpreting the

Portal Act. See id. at 255 n.9 (relying on 29 C.F.R. 790.8). These regulations, which were promulgated shortly after the Portal Act was passed, state that if an employee "cannot perform his principal activities without putting on certain clothes, changing clothes on the employer's premises at the beginning and end of the workday would be an integral part of the employee's principal activity." 29 C.F.R. 790.8(c). The regulations explain that "[s]uch a situation may exist where the changing of clothes on the employer's premises is required by law, by rules of the employer, or by the nature of the work." 29 C.F.R. 790.8(c) n.65. By contrast, "if changing clothes is merely a convenience to the employee and not directly related to his principal activities, it would be considered as a 'preliminary' or 'postliminary' activity rather than a principal part of the activity." 29 C.F.R. 790.8(c). DOL's longstanding position is that "if employees have the option and the ability to change into the required gear at home, changing into that gear is not a principal activity, even when it takes place at the plant." Wage and Hour Advisory Memorandum No. 2006-2, at 3.[2]

2. As an initial matter, this Court should take this opportunity to correct its misreading of the Supreme Court's decision in Alvarez. This Court stated that Alvarez held "that post-donning and pre-doffing waiting time was not a principal

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[2] DOL's Portal Act regulations were ratified by Congress in 1949 when former Section 16(c) of the FLSA was enacted. See Steiner, 350 U.S. at 254-55 & n.8 (quoting Section 16(c) to the effect that existing Wage-Hour regulations and interpretations were to remain in effect unless inconsistent with the 1949 amendments, 63 Stat. 920 (1949), 29 U.S.C. 208 (note)). In any event, these longstanding regulations, as well as this brief construing these regulations and Wage and Hour Advisory Memorandum No. 2006-2, are entitled to deference. See Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (Administrator's FLSA

activity and therefore was excluded from coverage under the Portal-to-Portal Act." Pirant v. United States Postal Serv., 542 F.3d 202, 208 n.2 (7th Cir. 2008). In fact, the Supreme Court held that post-donning and pre-doffing waiting time (as well as post-donning and pre-doffing walking time) was compensable as part of the continuous workday. See Alvarez 546 U.S. at 37, 40. The only time the Supreme Court found non-compensable was pre-donning waiting time. See id. at 40.

3. Moreover, while this Court acknowledged Steiner's "integral and indispensable" test, see Pirant, 542 F.3d at 208, it primarily relied on the Second Circuit's flawed decision in Gorman v. Consolidated Edison Corp., 488 F.3d 586 (2007), cert. denied 128 S. Ct. 2902 (2008), to conclude that Plaintiff's donning and doffing is not compensable. This reliance on Gorman, however, is not necessary to decide this case. Rather, this Court could have affirmed the district court's grant of summary judgment to the Postal Service on the basis that Plaintiff failed to allege that the donning and doffing she performed was required to be done on the Postal Service's premises, if it was in fact required at all. See Wage and Hour Advisory Memorandum No. 2006-2, at 3 (clothes changing is not a principal activity if it can be done at home); 29 C.F.R. 790.8(c) (clothes changing that is merely a "convenience" to the employee and not directly related to her principal activities is not a principal activity).

The affidavit Plaintiff submitted to support her claim that she is entitled to credit toward the FMLA's 1,250 hour eligibility requirement for the time she spent

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interpretations "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance").

each workday putting on and taking off her uniform shirt, gloves, and shoes states only that she would put these items on at the plant before her shift. See Pl's Ex. F, Decl. of Antoinette Pirant filed in support of Pl's Opp'n to Def's Mot. for Summ. J., at 4, ¶ 19-21 (District Court Docket No. 62); see also Def's Reply Mem. in Support of Def's Mot. for Summ. J. at 6 (District Court Docket No. 68). Plaintiff relied solely on this affidavit in her opposition brief, pointing to nothing else in the record that establishes that she performed these activities at the plant out of necessity, rather than as simply a convenience to herself. See Pl's Opp'n to Def's Mot. for Summ. J. at 2, 9. It is well settled that conclusory allegations and self-serving affidavits, without support in the record, are not sufficient to defeat a motion for summary judgment. See Hall v. Bodine Elec. Co., 276 F.3d 345, 354 (7th Cir. 2002). Because this Court may affirm the district court's entry of summary judgment on any ground that finds support in the record, see Jordan v. Summers, 205 F.3d 337, 342 (7th Cir. 2000), this Court could affirm the district court's judgment on this basis without relying on the Second Circuit's decision in Gorman.

4. This Court should not have relied on Gorman because that decision did not apply the correct criteria to determine whether clothes changing is compensable under the FLSA. First, the Second Circuit considered only selected regulatory language stating that clothes changing, "when performed under the conditions normally present, would be considered 'preliminary' or 'postliminary' activities," 29 C.F.R. 790.7(g), and thus noncompensable under the Portal Act. See Gorman, 488 F.3d at 594. The court inexplicably ignored a footnote appended to that regulation,

which states, "Washing up after work, like the changing of clothes, may in certain situations be so directly related to the specific work the employee is employed to perform that it would be regarded as an integral part of the employee's 'principal activity.'" 29 C.F.R. 790.7(g) n.49. The court also did not consider another DOL regulation, relied on by the Supreme Court in Steiner, see supra, explaining that clothes changing is compensable if an employee "cannot perform his principal activities without putting on certain clothes," 29 C.F.R. 790.8(c), and stating that "[s]uch a situation may exist where the changing of clothes on the employer's premises is required by law, by rules of the employer, or by the nature of the work." 29 C.F.R. 790.8(c) n.65.[3]

Second, Gorman emphasized the "generic" nature of the clothing worn by plaintiffs in that case, which included helmets, goggles, and steel-toed boots, to support its conclusion that donning and doffing the clothing was not compensable. See 488 F.3d at 594. However, as the Supreme Court recently suggested, this factor is not dispositive in determining whether Plaintiff's donning and doffing is compensable under the FLSA. See Alvarez, 546 U.S. at 32 (noting that although the Ninth Circuit had endorsed a distinction between donning and doffing elaborate

[3] As this Court noted, Gorman distinguishes Steiner on the basis that the equipment in Steiner protected employees from battery acid and therefore was "indispensable to making the working environment nonlethal." Pirant, 542 F.3d at 208. DOL disagrees with this aspect of the Gorman decision as well. Clearly, an activity may be integral and indispensable to an employee's principal activity without being necessitated by lethal circumstances. See, e.g., Ballaris v. Wacker Siltronic Corp., 370 F.3d 901, 911 (9th Cir. 2004) (donning and doffing cleanroom "bunny suits" integral and indispensable to employees' principal activities); Chao v. Tyson Foods, Inc., 568 F. Supp. 2d 1300, 1312 (N.D. Ala. 2008) (agreeing with Secretary's argument that Steiner cannot be read so narrowly).

protective gear and donning and doffing nonunique gear such as hardhats and safety goggles, it did so "not because donning and doffing nonunique gear are categorically excluded from being 'principal activities' as defined by the Portal-to-Portal Act, but rather because, in the context of this case, the time employees spent donning and doffing nonunique protective gear was 'de minimis as a matter of law'"). Indeed, Steiner itself addressed donning and doffing "non-unique" gear – namely, old, clean work clothes. 350 U.S. at 256. Thus, as the Department has made clear in its Advisory Memorandum, whether clothing is "unique" or "nonunique" is not dispositive in determining whether donning and doffing the clothing is compensable. See Wage and Hour Advisory Mem. No. 2006-2, at 3.

Third, Gorman inappropriately emphasized the "minimal" nature of the clothing at issue in that case in concluding that time spent donning and doffing that clothing at work was not compensable. See Gorman, 488 F.3d at 594. The amount of clothing worn, and the amount of effort involved in putting on or taking off this clothing, does not render donning and doffing the clothing non-compensable under the Portal Act if it would otherwise qualify as integral and indispensable under Steiner and the relevant DOL regulations. See Alvarez, 339 F.3d at 903 ("[E]ase of donning and ubiquity of use do not make the donning of such equipment any less 'integral and indispensable' as that term is defined in Steiner.").[4]

[4] The FLSA provides employers with a "de minimis" defense that allows them to avoid paying for otherwise compensable time in certain circumstances. See Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 692 (1946) ("When the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded."). When applying this defense in the donning and doffing context, however, it

A number of courts explicitly have disagreed with Gorman because of these flaws in its analysis. See Spoerle v. Kraft Foods Global, Inc., 527 F. Supp. 2d 860, 864-65 (W.D. Wis. 2007) (noting that Gorman's interpretation of Steiner is "truly bizarre"); see also Jordan v. IBP, Inc., 542 F. Supp. 2d 790, 808-09 (M.D. Tenn. 2008) ("[T]he Gorman Court did not explicitly consider whether the activities at issue there were required and necessary and whether they primarily benefi[t]ed the employer, and concluded, somewhat inexplicably and in reliance on Reich [v. IBP, Inc., 38 F.3d 1123 (10th Cir. 1994)], that an activity is not necessarily integral just because it was 'required by the employer or by governmental regulation.'") (quoting Gorman, 488 F.3d at 594); Chao v. Tyson Foods, 568 F. Supp. 2d at 1312 (declining to rely on Gorman); Lemmon v. City of San Leandro, 538 F. Supp. 2d 1200, 1204 n.3 (N.D. Cal. 2007) (rejecting reliance on Gorman's interpretation of the "integral and indispensable" standard). As explained above, this Court need not expressly reject, or even mention, Gorman in order to decide this case. See section 3, supra. Given the problems with the Second Circuit's analysis, which other courts have noted, this Court should not have relied on that decision here.

## CONCLUSION

For the foregoing reasons, the Secretary supports Defendant-Appellee's petition for panel rehearing. This Court should nonetheless affirm summary judgment for Defendant-Appellee for the reasons stated above.

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is the amount of aggregate time spent donning and doffing, and not the amount of clothing worn, that is relevant. See Wage and Hour Advisory Mem. No. 2006-2, at 4.

Respectfully submitted,

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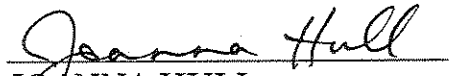

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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of October 2008, I transmitted fifteen copies, the original, and a digital version on CD-ROM, scanned for viruses, of the foregoing Brief for the Secretary of Labor as *Amicus Curiae* in Support of Defendant-Appellee's Petition for Panel Rehearing to the Clerk of the United States Court of Appeals for the Seventh Circuit, by causing the briefs to be sent by Federal Express overnight delivery to:

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I also hereby certify that two copies and a digital version on CD-ROM, scanned for viruses, of this Brief for the Secretary of Labor as *Amicus Curiae* in Support of Defendant-Appellee's Petition for Panel Rehearing have been served on each of the following counsel of record by U.S. First Class Mail, Postage Prepaid, this 31st day of October 2008:

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